No. 195

Supreme Court of the United States

OCTOBER TERM, 1953

INTERNATIONAL LONGSHOREMENS' AND WAREHOUSEMENS' UNION, LOCAL 37, *et al.*, *Appellants,*

vs.

JOHN P. BOYD, District Director, Immigration and Naturalization Service, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR APPELLANTS

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I.

THE COURT HAS JURISDICTION OVER THE SUBJECT MATTER AND THE PARTIES

A. The Union Has Standing to Maintain This Suit.

Appellee's position can be fairly characterized by the statement found on page 16 of his brief:

> "The union as such is not here involved. It is not an alien. No statute or regulation is or will be enforced against it. It will not leave the United State and be faced with the possibility of exclusion in seeking to return."

This position, it is submitted, ignores the claim (and

possibility), that the appellant union has a separate interest which is threatened by the present interpretation and enforcement of subsection 212(d)(7). On page 20 of the brief it is stated, in apparent answer to the union's contentions:

> "Obviously if only two members of the union were aliens, the union could not claim that its interest would be affected. The fact that in this particular case, there may be a somewhat larger number of alien members does not alter the situation. It is still clear that the union as such in its collective capacity has no direct interest in this suit."

Since the appellee urges that the appellant union's standing may depend on the number of aliens in its membership, it seems appropriate to call attention to the testimony of Mr. George Valdes, who, with appellant Mensalvas, and Mr. Vincent Pilien, appeared before the President's Commission on Immigration and Naturalization, on behalf of the appellant union. Mr. Valdes, at page 991 of the *Hearings,* stated:

> "Our union is composed of 80 per cent Filipino-Americans, and the remaining 20 per cent consists of Negro-Americans, Mexicans, Puerto Ricans, Chinese, Japanese and Hawaiians, and so-forth. These workers are engaged in the canned-salmon industry about 2 to 4 months during the summer period, and the rest of the year they are engaged in the agricultural crops in the State of California, especially."

See also the statement filed on behalf of the appellant union, which appears at pages 994-1001 of the *Hearings.*

It is thus clear, if this is important, that the status of the overwhelming majority of the membership of the

appellant union is affected by the proposed interpretation of subsection 212(d)(7).[1]

The above quotations from appellee's brief also illustrate his contention that the appellant union has no standing since the statute is not directed against it. (See also, Appellee's Brief, p. 22.) Appellants do not read the cases cited in their opening brief as setting any such requirement. The rule, it is submitted, is that the statute need only affect the rights of the party litigant, whether directly or indirectly. Thus, in *Buchanan v. Warley,* 245 U.S. 60, and *Barrows v. Jackson,* 346 U.S. 249, the white litigants were not prevented from buying real estate. Their standing arose from the fact that their potential market as vendors was indirectly curtailed. The case of *Moffat Tunnel League v. United States,* 289 U.S. 113, relied on by appellee, involved only the remoteness of the effect of a regulation of the Interstate Commerce Commission, and has no controlling relation to the issues presented by the union's suit. The instant case clearly falls within class of cases illustrated by *Pierce v. Society of Sisters,* 268 U.S. 510, commented upon recently by Mr. Justice Burton in *Barrows v. Jackson,* 346 U.S. 249, at 257, as follows:

"In short, the schools were permitted to assert

[1] The union, of course, will lose the dues of every member who is excluded, or, who abandons his Alaska employment altogether for fear of the risk to his status as a permanent resident of the United States. If the number becomes large enough, which is possible, with the presence of a dozen fellow members already caught in the net of the 1952 act, it will also jeopardize the union's ability to fulfil and maintain its contractual duties and rights; see, *Hynes v. Grimes Packing Co.,* 337 U.S. 86, at 99.

> in defense of their property rights the constitutional rights of parents and guardians."

It seems appropriate, while touching the problem of remoteness, also to call attention to the words of Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, at 154:

> "The fact that an advantageous relationship is terminable at will does not prevent a litigant from asserting that improper interference with it gives him 'standing' to assert a right of action."

Finally, on page 23 of appellee's brief, in footnote 8, it is timidly suggested that the case may be moot. This suggestion is totally without merit. First, the Collective Bargaining Agreement referred to (which is on file with the Clerk of this Court) is only "The most recent collective bargaining contract of the union" (R. 2, Fdg. VII), and, moreover, is "in full force and effect until April 30, 1954" (Page 22 of the exhibit). Second, since the issues presented by this appeal will be of a recurring nature, i.e., "every summer" (R. 1, Fdg. II) there will be a dispute as to appellee's interpretation of subsection 212(d)(7), the remedy of injunction is still appropriate: *J. I. Case Co. v. National Lab. Rel. Bd.,* 321 U.S. 332. See also: *Walling v. Helmerich & Payne Inc.,* 323 U.S. 37; *Federal Trade Comm. v. Goodyear Tire & Rubber Co.,* 304 U.S. 257.

B. There Is a Justiciable Controversy.

On page 2, under Questions Presented, appellee summarizes his contention as follows:

> "Whether the controversy is justiciable since there is no allegation that any effort has yet been

made to enforce the terms of the statute against appellants or any individuals they purport to represent."

and on page 24, he states:

"* * * appellants solicit an advisory determination on a hypothetical case that may never materialize as to them.'

It is admitted, however, in the Appendix (pages 77 and 78 of appellee's brief), that at least 12 members of the union (properly represented by the individual appellants), are being held for warrant proceedings, as was stated in the footnote on page 11 of appellant's opening brief. This was what was threatened by appellee a year ago, and the reason for the declaratory and injunction action being brought initially, prior to the 1953 season and the actual exclusion of any individual members of the union. There was not only an actual controversy at the commencement of the action, but there are now at least a dozen individuals represented in this action who are presently being held for exclusion.[2] See, *Railway Mail Assn. v. Corsi,* 326 U.S. 88, 93, (footnote 10). Their exclusion cases are awaiting this Court's decision, but they are not alone in this

[2] As is noted in appellee's appendix, at page 78 of his brief, the basis for the exclusion proceedings is prior conviction of a crime involving moral turpitude. This fact highlights the importance to these individuals of their status as permanent residents of the United States, since such an act subjects them to exclusion pursuant to subsection 212(a)(9), but does not subject them to expulsion unless the crime was committed within five years of the last entry: subsection 241(a)(4).

regard. In *Haymes v. Landon* (S.D. Cal.) 115 F. Supp. 506, in denying an application for a three-judge court, it is stated at 509:

> "The fact that a District Court did convene three judges and hear that case, is cited by petitioner as authority for this court to hear the present case, and try anew in this District Court what another District Court has already decided and the Supreme Court is about to review. Administrative celerity can hardly decide petitioner's case until enough time has elapsed that there will be a Supreme Court determination of the question which may, but might not, be the basis of ultimate administrative decision in this matter."

Appellee, as below, relies chiefly upon the case of *United Public Workers v. Mitchell,* 330 U.S. 75. Mr. Justice Reed, *supra,* at 88, pointed out, quite clearly that in that case:

> "[Appellants] * * * declare a desire to act contrary to the rule against political activity but not that the rule has been violated."

And further, *supra,* at 90:

> "We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication."

In the present case, however, an action was brought by, and in behalf of, individuals who intended to do, and did, a specific act: namely, travel directly to, and return directly from, Alaska. This case does not, therefore, present hypothetical issues. It presents a specific, concrete controversy over the application of a specified

statute because of this travel.[3] These facts clearly bring this case within the holding of *Railway Mail Assn. v. Corsi,* 326 U.S. 88, in which Mr. Justice Reed stated, *supra,* at 93:

> "*The conflicting contentions* of the parties in this case as to the validity of the state statute *present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. Legal rights* asserted by appellant are threatened with imminent invasion by appellees and *will be directly affected* to a specific and substantial degree by *decision of the questions of law.*" (Emphasis supplied.)

There is nothing, it is submitted, that can distinguish the instant facts from the *Corsi* case. If jurisdiction does not exist here, then there is little left of the intended effect of the Declaratory Judgment Act, 28 U.S.C. §2201. See, *McGrath v. Kristensen,* 340 U.S. 162, 169.

Appellee's position amounts to a request that this

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[3] Appellant Mangaong is business agent of the appellant union (R. 2, Fdg. III). Under section 26 of the Collective Bargaining Contract (on file with the Clerk of this Court) he is the duly authorized agent to act for the Union. The section also provides for the settlement of disputes, if possible, in Alaska. He has a contractual duty, therefore, to travel to Alaska, an interest which justifies his maintenance of this action irrespective of whether or not he actually goes there. Cf. also the testimony of Mr. Valdes, on this point, in *Hearings Before The President's Commission On Immigration,* p. 991. He is not presently deportable under subsection 241(a)(6) of the act; *Mangaoang v. Boyd* (C.A. 9) 205 F.(2d) 553, but would be excludable under subsection 212(a)(28). The same is true of appellant Mensalvas, (R.6, Fdg. IX).

court postpone consideration of the vexing legal issues presented (which are ripe for decision), to the indefinite future and thus prolong a state of confusion which is helpful neither to the parties, the alien population as whole, or to the judiciary. (See: *Haymes v. Landon* (S.D. Cal.) 115 F. Supp. 506) and which will require twelve individuals, properly represented in this action, to pursue unnecessary, lengthy and costly legal action by way of habeas corpus, during which time their freedom may be denied them.[4]

It is submitted that the above considerations fully dispose of the merits of appellee's contentions. Regarding this issue, at least, the court below was correct. See also, *Haymes v. Landon, supra,* at 509.

C. The Attorney General Is Not An Indispensible Party.

Appellee contends, on pages 33-34 of his brief, that the dispute here is not localized; that the District Court is not in a position to settle the controversy; and that his "sole function * * * is to examine aliens seeking to enter and detain for further injuiry any alien whose right to land does not appear clear and beyond doubt" (Appellee's Brief, pp. 34-35). Further, he states that "There is no particular reason to believe that the aliens here involved would all attempt to reenter the United

[4] There is no right to bond pending appeal from an exclusion order. The fact that they are now released is not determinative, as appellee may well decide to revoke the present arrangement as soon as final orders of exclusion are obtained. This was, at least, the position of the Immigration Service on the East coast; see: *United States v. Shaughnessy* (S.D. N.Y.) 113 F. Supp. 49, at 52.

States at the particular port in the particular district where this proceeding was commenced" (Appellee's Brief, p. 38).

First, it should be pointed out that the admitted facts indicate that the members return to Seattle (R.2, Fdg. VII). This is in accordance with the Collective Bargaining Contract (on file with the Clerk of this Court) which provides in section 19, that the membership are furnished transportation from and return to the port of embarcation, which is Seattle. The appellee is admittedly the responsible immigration officer in Seattle (R.2, Fdg. IV).

Second, the power to detain the alien members of the appellant union is the point in contest, precipitated by a disagreement regarding the status of appellants and those they represent. If appellee desists in detaining those he already is detaining, and is ordered to detain no other aliens similarly situated, the matter is at an end. Nor is any affirmative action on the part of the Attorney General required to settle the issues presented. It is therefore submitted that the requirements enumerated in *Williams v. Fanning,* 332 U.S. 490, and *Hynes v. Grimes Packing Co.,* 337 U.S. 86, are fully met. The court has before it all the parties necessary to fully adjudicate the issues and implement its decision.

Finally, appellee concludes, on page 38 of his brief, that:

> "An order in this case would not be binding on the Attorney General, the Board of Immigration Appeals, or the Commissioner of Immigration and Naturalization, who have ultimate authority to administer the immigration and nationality laws and

to determine the admissibility and deportability of aliens."

Appellants are unable to fully comprehend the intended meaning of this argument, for surely, it cannot be interpreted as meaning that the Attorney General or his subordinates would refuse to follow the decision of this court.[5] What is more striking, perhaps, is the fact that the Attorney General is represented on the brief that raises this argument. He is having his hearing on the merits the very moment the argument is urged that he will not be bound by the outcome.

D. The Remedy Is Appropriate.

In order to avoid a hearing of the issues on the merits, appellee also seeks aid from the recent case of *Heikkila v. Barber,* 345 U.S. 229, in which it was stated, *supra,* at 235, that "Now, as before, he [the alien] may attack a *deportation order* only by habeas corpus." (Emphasis supplied.) Appellee, on page 39 of his brief, however, would have us believe that the *Heikkila* case stands for the rule "that habeas corpus is the exclusive remedial device for judicial inquiry in deportation cases." How such an interpretation can be urged is beyond the understanding of appellants, for in the *Heikkila* case itself the cases of *Perkins v. Elg,* 307 U.S. 325, and *McGrath v. Kristensen,* 340 U.S. 162, which involved the determination of a *status* (as here), were distinguished on that ground, rather than overruled. In the *Kristensen* case it is stated, *supra,* at 169:

"Where an official's authority to act depends

[5] This argument could be made in any habeas corpus-deportation case with equal merit.

> upon the status of the person affected * * * that status, when in dispute, may be determined by a declaratory judgment proceeding * * * This is an actual controversy between the alien and immigration officials over the legal right of the alien to be considered for suspension. As such a controversy over federal laws, it is within the jurisdiction of federal courts * * * "

Moreover, the *Heikkila* case involved an attack of a deportation order pursuant to the 1917 act, rather than the 1952 act which is involved herein. This fact would make the *Heikkila* case doubtful authority, at best, in view of the decision in *Rubinstein v. Brownell* (C.A. D.C.) 206 F.(2d) 449, which is now pending before this court: October Term, 1953, No. 300.

II.

THE STATUTE WAS IMPROPERLY CONSTRUED AS APPLYING TO ALIEN PERMANENT RESIDENTS OF THE UNITED STATES WHO SEEK TO RETURN TO THEIR PERMANENT RESIDENCE ON THE MAINLAND AFTER TRAVELING TO ALASKA

Appellee concedes, on page 44 of his brief, that:

> "Undoubtedly, the main purpose of these provisions was to prevent excludable aliens from using entry into and residence in the territorial possessions as a means of entry into the United States."

As was anticipated in appellants' opening brief, at pp. 15-16, to espouse appellee's interpretation of the statute, however, it is necessary to urge the proposition that Congress has used "entry" in sub-section 212(d)(7) in a different and undefined sense.[6]

[6] It should be noted, in this connection, that both S. Rep. 1137, 82nd C., 2nd S., at p. 4, and H. Rep. 1365, 82nd

Appellee undertakes this task in two ways. First, it is urged that subsection 212(d)(7) clearly must be interpreted as providing, in effect, that Alaska be treated for exclusion purposes as a foreign country. This assumption is made explicitly for example, on page 47:

> " * * * the underlying concept of Section 212 (d)(7), recognized as such by Congress is that, for the purposes of entry into the United States by aliens, the territorial possessions are different from the continental United States and in status like that of a foreign country."

This assumption is implicit when appellee relies heavily on the reentry doctrine, on pages 48-50, and is then stated explicitly again, on page 51, as follows:

> "While the reentry doctrine concerns primarily aliens returning from a foreign port or place, it seems clear that Section 212(d)(7) was designed to assimilate Alaska to a foreign country for the purpose of limiting admissibility to the United States."

It should be noted that because Congress treats Alaska differently for certain purposes, it does not follow, automatically, that the only possible status for Alaska is that of a foreign country.

Apparently recognizing this problem, and realizing that the main issue, the meaning of the term "entry," is begged by such an argument, appellee is forced to

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C., 2nd S., at p. 32, note, regarding the word "entry," " * * * the term is not precisely defined in the present law," [*i.e.*, the law prior to the enactment of the current 1952 act]. Immediately thereafter they comment, significantly, that "The bill defines the term 'entry' as precisely as practicable, giving due recognition to judicial precedents."

make his second, and fundamental, assumption, on page 52:

> "This definition states the general rule that entry ordinarily is accomplished by coming from a foreign port or place. But in unmistakable language Congress has modified this definition in Sec. 212(d)(7), which declares that its commands relate to aliens who leave Alaska and seek to enter continental United States."

See also, *e.g.*, page 35 of appellee's brief.

Let us examine the definition of entry and determine how "unmistakably" congressional intent is demonstrated. The full definition [subsection 101(a)(13)], quoted in neither of the preceding briefs, is as follows:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, *except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States* for the purposes of the immigration laws *if the alien proves* to the satisfaction of the Attorney General *that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception." (Emp. supp.)

The unmistakable conclusion from the exception to this definition is that voluntary travel to and return from the territories by lawful permanent residents is

not to be considered a departure and reentry. If this interpretation is not adopted, we are forced to the ridiculous conclusion that Congress intended that travel to and return from the territories, whether voluntary or involuntary, is a departure and reentry, while only *voluntary* travel to a foreign country is a departure. In other words, we are asked to believe that a resident alien who is on a sinking ship in the northwest coastal waters of North America will be entitled to return to the mainland unrestricted, if he is fortunate enough to land in Canada, but will be subject to exclusion if he has the misfortune to land in Alaska!

Approaching the same argument from a different angle, if Congress intended the result appellee attempts by his construction of subsection 212(d)(7), there would be no real purpose for the passage of the subsection. The simplest, and clearest way to have expressed such a purpose would have been to have defined the term entry something like the following:

> "The term 'entry' means any coming of an alien into the continental United States, from a foreign port or place, or from an outlying possession, or Hawaii, Alaska, Guam, Puerto Rico, the Virgin Islands of the United States, or any other place under the jurisdiction of the United States, whether voluntary or otherwise, except * * *."

Such a definition would retain the basic definition of an entry, achieve appellee's purpose, and would also obviate the necessity of subsection 212(d)(7).[7] The

[7] In the senate there was a proposed amendment to the definition which, however, far from urging such a change, attempted to extend the exception to include aliens who are "returning after a temporary absence

fact that Congress did not do this, it is submitted, is precisely because the purpose of the subsection is the same as was the purpose of the earlier provision in the 1917 act; a purpose which does not coincide with appellee's interpretation.

The wording of former 8 U.S.C. 137, 39 Stat. 874, is markedly similar to the wording of subsection 212 (d)(7). The pertinent language of the 1917 act was:

> "* * * but if *any alien shall leave* the Canal Zone or any insular possession of the United States and attempt *to enter any other place under the jurisdiction of the United States,* nothing contained in this chapter shall be construed as permitting him to enter under any other conditions than those applicable to all aliens."

The relevant portion of subsection 212(d)(7) reads:

> "The [exclusion provisions] * * * of this section shall be applicable to *any alien* who *shall leave* Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands of the United States, and who seeks *to enter*

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in foreign contiguous territory to an unrelinquished domicile in the United States." S. 2550, 82 C., 2nd S., Calendar No. 1072, May 9, 1952, p. 2.

It might be significant to note, in passing, that there was no provision comparable to subsection 212(d)(7) in S. 3455, 81st C., 2nd S., although the definition of entry was present. The provision appeared for the first time in S. 716, 82nd C., 1st S., p. 59; and also appeared in HR 2379 and HR 2816, both 82nd C., 1st S., p. 59. In none of these three bills, however, did the proviso, which is now present in subsection 212(d)(7), appear. It only appeared in the final versions which passed; *i.e.,* S. 2550, 82nd C., 2nd S., and HR 5678, 82nd C., 2nd S. During all these changes, however, the definition of entry remained untouched.

> the continental United States or *any other place under the jurisdiction of the United States* * * *."

The italicized portions are identical. The differences in wording, however, are not significant; *e.g.*, "insular possessions" under the 1917 act included all the territories listed in the 1952 act except Alaska.[8]

S. Rep. 352, 64th C., 1st S., states at page 3, that the 1917 provision was intended:

> " * * * to make it perfectly clear that the admission of an alien to the insular possession does not privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens have been using the insular territory (particularly the Philippines) as a 'stepping stone' to the continent, avoiding close inspection by first securing admission to the Philippines and then coming 'coastwise' to the United States proper."

This statement is a clear recognition of the conditional entry theory adopted in the still earlier case of *Healy v. Backus* (C.A. 9) 221 Fed. 358, which was discussed at pages 19-20 in appellants' opening brief.

In the late forties, the Senate appropriated $335,000.00 for a "full and complete investigation of our entire immigration service." The Immigration Service co-operated fully, and the committee received, among other things, memoranda from various immigration officers regarding their practice and proce-

[8] The addition of Alaska is the only change intended by subsection 212(d)(7), according to S. Rep. 1137, 82nd C., 2nd S., p. 14, and H. Rep. 1365, 82nd C., 2nd S., p. 53.

dure.[9] The result of this project was the massive, 925-page, S. Rep. 1515, 81st C., 2nd S. Under Chapter VIII of Part I, at page 658, the report commented on the problem presented here:

> "Alien residents of the continental United States are not subject to the exclusion provisions of the Act of 1917 when traveling from the continental United States to any of our insular possessions and return."

Appellee's only comment regarding this clear confirmation of appellants' contentions, is:

> "This statement finds no support in any statute, administrative construction, or decision, and appears to be erroneous." (Appellee's Brief, p. 51, footnote 24)[10]

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[9] See S. Rep. 1515, 81st C., 2nd S., pp. 1-3.

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[10] Even if we were to grant that the report erroneously construed prior practice under the 1917 Act, that argument still begs the question, since the report states what Congress thought was the prior practice, and it was this rule that Congress intended by the passage of subsection 212(d)(7): see, S. Rep. 1137, 82nd C., 2nd S., p. 14, and H. Rep. 1365, 82nd C., 2nd S., p. 53. The only contrary interpretation that appellee is able to muster is the very late (1949) administrative decision of *Matter of O'D*, 3 I & N Dec. 632. That case involves actual transit to foreign territory, but does represent a contrary interpretation of the 1917 act. Significant, however, is why this interpretation was only adopted after the lapse of 32 years from passage of the 1917 Act; and, moreover, why was it not communicated to the Senate committee when it was investigating all phases of immigration practice. There is no mention of this interpretation in any of the reports regarding the 1952 Act. Rep. Walter clearly did not agree with such an interpretation, for he stated, as quoted on page 22 of appellants' opening brief, that permanent

The report goes on, however, and again, at page 660, adverts to our problem:

> "An alien resident of the United States, who visits Hawaii and wishes to return to the mainland, is issued a form which shows the port and date of original arrival in the United States, the name of the ship which brought him to the United States, and *the claimed status.* He is not required to present a passport or visa when traveling between the continental United States and any outlying insular possession of the United States or when traveling from one insular possession to another."[11] (Emp. Supp.)

The congressional history upon which appellee relies in order to avoid this meaning, misses the mark, for it all deals with the status of *residents of the territories,* as distinguished from *residents of the mainland,* the status involved in this case.[12]

[11] The report cites former 8 CFR 176.202(g), 12 FR 9987, 9988 regarding the travel documents. Similar, although not identical provisions appear in 8 CFR 211.2(c)(3), 17 FR 11483.

[12] This is true of the quotation from S. Rep. 1515, 81st C., 2nd S., p. 674 (Appellee's Brief, p. 44); the congressional debates and hearings relied on (Appellee's

residents of the United States "can come to the mainland."

Note also, that in the government's brief in *Brownell v. Rubinstein,* October Term, 1953, No. 300, a different attitude to S. Rep. 1515 is reflected. It is there stated: "In the comprehensive 1950 Report of the Senate Committee on the Judiciary (Senate Report 1515, 81st Cong., 2nd Sess.) entitled "The Immigration and Naturalization System of the United States" and *which embodies the congressional understanding of existing law upon which the 1952 Act was predicated,* it was stated * * *." (Emp. supp.)

The only other argument that appellee can muster to avoid the plain meaning of the definition of entry as employed in subsection 212(d)(7) is:

> "Congress was doubtless aware of the close proximity of Alaska to Soviet Siberia and the difficulty of maintaining adequate controls in the vast, sparsely-populated expanses of the Alaska outpost and its adjacent islands."

This argument invites the following statement, also from S. Rep. 1515, 81st C., 2nd S., p. 671:

> "There do not appear to be any serious immigration-control problems which are peculiar to Alaska. Immigration and naturalization problems in Alaska concern naturalization hearings and the delivery of certificates of citizenship."[13]

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[13] In footnote 26, on page 55 of appellee's brief, there is a quotation from H. Rep. 1365, 82nd C., 2nd S., p. 28, to the effect that one of the "basic and significant" changes made by the 1952 act was that it "Provides for a more thorough screening of aliens, especially of security risks and subversives." Immediately following this statement, as parenthetic examples, there appears: "(Secs. 212, 241, and 313)." This addition demonstrates that by "screening" was meant *either exclusion* (covered by section 212) *or expulsion* (covered by section 241). Attention also might be called to the reliance, on page 73, of a 1953 report, which, of course, was written after the passage of the 1952 Act.

Brief, pp. 45-46); the *Report of President's Commission on Immigration* and the *Hearings Before President's Commission on Immigration* (Appellee's Brief, p. 47); and HR 370, S. 952, 83rd C., 1st S. (Appellee's Brief, p. 47), which merely propose to delete Alaska from subsection 212(d)(7). It is also true of the cases of *Matsuda v. Burnett* (C.A. 9) 68 F.(2d) 272; *Sugimoto v. Nagle* (C.A. 9) 38 F.(2d) 207; and *Karamoto v. Burnett* (C.A. 9) 68 F.(2d) 278 (Appellee's Brief, p. 43).

On page 54, appellee states:

> "* * * appellants hardly can escape the reach of the statute whether they are regarded as immigrants or non-immigrants."

This statement appears to miss completely the import of appellants' argument. It assumes that resident aliens must either be immigrants or non-immigrants. Appellants contend, however, that once an alien is lawfully admitted for permanent residence, he ceases to be either an immigrant or a non-immigrant; he becomes a permanent resident, a status which Congress states an immigrant is seeking when he attempts to enter.[14]

Finally, in attempting to circumvent the holding of *Chew v. Colding,* 344 U.S. 590, appellee, on page 57 of his brief, states:

> "Appellants do not refer to the subsequent decision of this Court in *Shaughnessy v. Mezei,* 345 U.S. 206, which described the limited reach of the *Chew* decision. In the *Mezei* case the Court carefully pointed out that 'For the purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not * * *.'"

The *Mezei* case, of course, was a traditional reentry case. The real meaning of the language relied upon by appellee is readily seen when the quote is placed in context, *Shaughnessy v. Mezei,* 345 U.S. 206, 213:

> "In sum, harborage at Ellis Island is not an

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[14] See H. Rep. 1365, 82nd C., 2nd S., pp. 36-37, as quoted on page 15 of appellants' opening brief.

entry into the United States. [citing cases] For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be excluded if unqualified for admission under existing immigration laws. [citing cases]

"To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. *Kwong Hai Chew v. Colding,* 344 U.S. 590, 601 * * * ."

Commenting further on the following page in the *Mezei* case, this court stated:

" * * * to escape constitutional conflict we held the administrative regulations authorizing exclusion without hearing in certain security cases inapplicable to aliens so protected by the Fifth Amendment."

Thus, as appellants read the *Mezei* case, it confirmed, rather than limited the holding of the *Chew* case. Moreover, the facts in the instant case are far stronger than those in the *Chew* case, since there has been no travel outside of the territorial limits of the United States.

To conclude (borrowing the words of appellee, at page 56 of his brief):

" * * * we cannot perceive any reasonable basis for departing from the normal, unambiguous meaning of the language used by Congress and embarking on a speculative effort to find another reading, not articulated in the statute and not supported by any indicia of legislative design."

III.

THE PROVISIONS OF SUB-SECTION 212(d)(7) ARE UNCONSTITUTIONAL AS INTERPRETED BY THE COURT BELOW

The basic differences between the parties regarding this point may be summarized fairly simply.

First, the appellants are not contending that they have a vested right to remain in the United States under all conditions. This windmill is fairly well destroyed by appellee's discussion under part A, but the argument misses the essential point: as lawful permanent residents, appellants and those they represent, not only can, but *must,* be expelled, if deemed undesirable. The real dispute is over the power to *exclude* them when they have never left the United States.[15]

Second, under part B of his argument, appellee labors long and hard to establish the power of Congress to regulate the political status of the territories, while conceding "it is manifest * * * that Alaska is not foreign territory" (Appellee's Brief, p. 67). He also concedes that the "Constitution safeguards the 'funda-

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[15] Here, as usual, appellee assumes his conclusion, when he argues, on pages 61-63 of his brief, that Congress has the power to exclude entering aliens. The dispute, however, is whether there can constitutionally be an entry when the alien resident never leaves the territory of the United States. See especially, pages 33-36 of appellants' opening brief.

On page 66, appellee argues that restriction of travel is included in the general power to expel. The power to expel, however, does not, it would seem, include, *e.g.,* the power to sterilize; in other words, the right to travel and work (short of expulsion) is not necessarily an included part of the power to expel.

mental rights of the individual' * * * ."[16] whether the individual resides on the mainland or in the territories (Appellee's Brief, p. 68).

Again, this argument is beside the point, for, as pointed out clearly[17] the issue is the power of Congress to inhibit the travel of lawful resident aliens within the United States in pursuance of their contractual rights of employment. When faced with the real issue, appellee calls upon the war emergency cases, and makes the bold assertion that "even some restrictions upon travel between the states might well be deemed justified" (Appellee's Brief, p. 75).

It is submitted, however, when properly viewing the issues presented by appellants, appellee fails completely (and cannot) answer the constitutional contentions raised.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

A. L. Wirin,
Norman Leonard,
John Caughlan,
Siegfried Hesse,
Counsel for Appellants.

January 1954

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[16] Appellants pointed out in their opening brief that the right to work is one of the most fundamental rights a resident alien has for he "cannot live where * * * [he] cannot work," *Truax v. Raich*, 239 U.S. 33, 42.

[17] Appellants' Opening Brief, pp. 32, 35.

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ADDENDUM

The following has just come to the attention of the Appellants:

1. With respect to the 1917 Immigration Act, predecessor to the 1952 Act (which modifies the 1917 Act, by merely adding Alaska to insular possessions), the following is noteworthy:

On March 19, 1914, the Secretary of Labor, W. B. Wilson, suggested an amendment to HR 6060, which later became the 1917 Immigration Act. As originally drafted, Section 2 of the 1917 Act did not contain the words "or any insular possession of the United States" (following the words *Canal Zone*). This addition was suggested by the Secretary of Labor with the following comment: (S. Doc. 451, 63rd Congress, Second Session):

> "The coming of aliens coastwise to the mainland from the insular possessions—particularly of Asiatic aliens from the Philippine Islands has become a matter of grave concern. It is believed that the simple change in the law here suggested would provide a remedy as under the law so amended, the insular possessions could not be used as a stepping-stone to the mainland by aliens of classes whose entry to the mainland would be regarded by all as undesirable, but whose admission to the Philippines, for instance, might not be considered inadmissible by the authorities in charge of the enforcement of the Immigration laws in those Islands."

The suggestion of the Secretary of Labor was approved, for the following appears in Senate Report 355, 63rd Congress, Second Session:

> "On page 2, line 3, following the words 'the Canal Zone', insert 'or any insular possession of the United States', so as to make it perfectly clear that the admission of an alien to the insular possessions does not

privilege such alien to come to the mainland without examination. The necessity for the provision is the fact that aliens are using the insular territory (particularly the Philippines and Hawaii) as 'stepping-stones' to the continent. (See letter of Secretary of Labor S. Doc. 451, pp. 3-4)."

2. Judicial interpretation of the 1917 Act, is to the effect that it does *not* apply to permanent alien residents of the United States visiting temporarily on insular possessions.

See opinion in *U. S. A. ex rel. Voielr* v. *Savoretti*, U.S. Dist. Ct., So. Dist. Fla., No. 5124 M, Civil, set forth in Appendix A hereto; and Findings of Fact and Conclusions of Law in *Taran* v. *Brownell*, U.S. Dist. Ct., Dist. Col., No. 3494-53, Conclusions of Law No. 2, Appendix B hereto.

Appendix A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

No. 5124-M-Civil

United States of America, ex rel Harry O. Voiler, *Petitioner,*

vs.

Joseph Savoretti, District Director, United States Immigration and Naturalization Service, District No. 6, Miami, Florida, *Respondent*

Court's Opinion

The Court has considered the petition for Habeas Corpus, the Return thereto, and the Traverse to such return.

It appears to the Court that the primary question involved herein is whether the petitioner Voiler made an entry into the United States within the meaning of the Immigration

Act of 1917. I have been cited no authority and am not familiar with any dealing with the precise facts as involved in this case, to-wit: An alien leaving the Continental United States for a trip to an insular possession and return to the Continental United States.

Under Title 8 U.S.C., Section 173, it is expressly provided that any alien leaving the Canal Zone or any insular possession of the United States and attempting to enter the United States shall, in effect, be subject to the same entry provisions as if he came from a foreign country. However, it appears to me that under the definition of "United States" as set forth in the Statute that by going to Puerto Rico the petitioner never did leave the United States and, therefore, his return to the Continental United States did not constitute an entry within the meaning of the Immigration Act.

Petitioner Voiler was not an alien resident in Puerto Rico seeking entry into the Continental United States. He as an alien, resident in the United States, the Continental United States, by his trip to Puerto Rico did not leave the United States. Neither did he as an alien, resident in Puerto Rico, leave Puerto Rico to make entry into the Continental United States. A further fact is pertinent here, he as an alien, resident in the Continental United States, did not leave and go to a foreign country.

In order for a resident alien of the Continental United States to be subject to the entry conditions of the statute, he must remove himself from the United States as defined, including the insular possessions, to a foreign port or place and then return to the United States.

On this ground, and on this ground alone, it is the opinion of the Court that the petitioner should be granted the relief prayed for.

The Court is of the further opinion that all of the other grounds for relief set forth in the petition are not well founded.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3494-53

SAMUEL TARAN, *Plaintiff*,

vs.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 24, 1953

This case having come on to be heard upon plaintiff's motion for summary judgment, and the Court having heard oral argument and considered all the pleadings herein, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff, Samuel Taran, is an alien and a native of Russia, who was lawfully admitted to the United States for permanent residence on June 21, 1912.

2. The plaintiff, on or about March 24, 1951, made a trip to Puerto Rico and returned to Miami, Florida, on March 29, 1951.

3. At the time of plaintiff's arrival in Miami on March 29, 1951, he physically presented himself to an Immigration Inspector and was permitted to re-enter Continental United States.

4. At the time of plaintiff's arrival in Miami, Florida, on March 29, 1951, he represented that he originally came from Minnesota.

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6. Plaintiff did reside in Minnesota for a number of yea 's prior to 1945.

7. On June 21, 1951, the plaintiff was served with a warrant of arrest in deportation proceedings and subsequently ordered deported upon the ground that his arrival from Pueto Rico was an entry within the contemplation of the Immigration laws and that he had entered the United States without inspection.

8. The deportation of plaintiff will result in irreparable damage and injury to him.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the instant action under the Declaratory Judgment Act (22 U.S.C. 2201) and under the Administrative Procedure Act (5 U.S.C. 1001 et seq.).

2. *Plaintiff did not make an entry into the United States within the meaning of the Immigration laws when he returned to the Continental United States from Puerto Rico on March 29, 1951.* (Italics supplied.)

3. Plaintiff is entitled to judgment and an order permanently enjoining the Attorney General of the United States and his subordinates from apprehending or deporting plaintiff upon the theory that he entered the United States from Puerto Rico on March 29, 1951.

(S.) RICHMOND B. KEECH,
United States District Judge.

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3. S. Rep. No. 1515, 81st Cong. 2d sess., so heavily relied on by Appellants herein, (and which the Appellee deems erroneous, is very heavily relied on by the Government in other cases in this Court.

See *Brownell* v. *Rubinstein*, this term, No. 300, Brief for Petitioner, pp. 8, 19, 33, and 35:

> "In the *comprehensive 1950* report of the Senate Committee on the Judiciary (S. Rep. 1515, 81st Cong., 2d Sess.) entitled *The Immigration and Naturalization Systems of the United States*, and which embodies the *Congressional understanding of existing law upon which the 1952 Act was predicated*, it was stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." (Italics supplied.)
>
> "The Immigration and Nationality Act of 1952 was preceded by extensive Congressional studies of the pre-existing laws and their operation. The results of these studies are contained in S. Rep. 1515, 81st Cong., 2d Sess., dated April 20, 1950, a report of the Senate Committee on the Judiciary entitled *The Immigration and Naturalization Systems of the United States.* This report appears to constitute the Congressional understanding of the prior law upon which the 1952 Act was predicated."
>
> "This conclusion finds authoritative support in S. Rep. 1137 which left the review of deportation orders to "existing law," *which was carefully defined in the foundation S. Rep. 1515* as precluding judicial review except in habeas corpus proceedings." (Italics supplied.)

And in *Shaughnessy* v. *Mezei*, October Term, 1952, in its Brief for the Petitioner deemed the Report as reflecting an "exhaustive investigation of our immigration laws *and practices* . . ." (p. 25). See also, *Shung* v. *Brownell*, this term, No. 241, Brief for the Respondent, p. 36; and *Heikkila* v. *Barber*, October Term, 1952, No. 426, Brief for the Appellee, p. 32.